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## COMMENTS

### **Directives and the Doctrine of Direct Effect: A Critique of *Marshall v Southampton Area Health Authority***

*Robert Scarborough*<sup>†</sup>

Throughout its history, the European Community ("EC" or "Community") has struggled with the failure of Member States to comply with Community law. Even during the late 1950s and early 1960s, a period of relative enthusiasm about a more united Europe, Member States often breached their Community obligations by failing to incorporate provisions of the EEC Treaty ("Treaty") or a directive into national law. Today, noncompliance with directives remains "the most typical and frequent form of member-state infraction" of Community law.<sup>1</sup>

Failure by a Member State to adopt legislation pursuant to a Treaty provision or directive results in the uneven application of Community law. To discourage this and to minimize the incentives for Member States to delay the implementation of a Treaty provision or directive, the European Court of Justice ("ECJ") developed the doctrine of direct effect.<sup>2</sup> This doctrine requires that national courts give effect to a right, granted in a sufficiently clear and unconditional instrument of Community law,<sup>3</sup> regardless of a conflicting national law. Thus, even when a Member State fails to imple-

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<sup>1</sup> G. Federico Mancini, *The Making of a Constitution for Europe*, in Stanley Hoffmann and Robert O. Keohane, eds, *The New European Community* 177, 182 (Westview, 1990). Though noncompliance with directives may be a frequent type of Community law violation, Member States nonetheless implement most directives.

<sup>2</sup> For a more thorough discussion of the direct effect doctrine see, generally, Gerhard Bebr, *Development of Judicial Control of the European Communities*, 548-611 (Martinus Nijhoff, 1981). See also, Trevor Hartley, *The Foundations of European Community Law*, 183-218 (Clarendon Press, 1988).

<sup>3</sup> For a detailed discussion of these requirements, see Hartley, *Foundations* at 187-94 (cited in note 2).

ment a Treaty provision or directive, an individual may be able to rely on it in a national court.<sup>4</sup>

The ECJ originally developed the doctrine in response to the reluctance of some Member States to incorporate certain provisions of the Treaty into national law. In the case establishing the direct effect doctrine, *Van Gend en Loos v Nederlandse Administratie der Belastingen*,<sup>5</sup> the ECJ held that a sufficiently clear and unconditional Treaty provision grants justiciable rights that an individual could enforce against a Member State in a national court. The ECJ further extended the scope of the direct effect doctrine in *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*,<sup>6</sup> holding that a individual may invoke a Treaty provision against another individual as well as a Member State. After *Defrenne*, an individual could enforce a right, granted in sufficiently clear and unconditional Treaty provision, regardless of the opposing party's status.<sup>7</sup>

The ECJ in *Grad v Finanzamt Traunstein* implicitly extended the doctrine of direct effect to cover directives, holding that an individual could enforce—against a Member State—a right outlined in a directive.<sup>8</sup> In *Marshall v Southampton & South-West Hampshire Area Health Authority*, however, the ECJ rejected the argument that an individual could invoke a directive against another individual.<sup>9</sup>

This Comment argues that the ECJ decided *Marshall* incorrectly. Parts I and II develop the reasoning in *Grad* and *Marshall*

<sup>4</sup> To understand how the doctrine of direct effect works, consider the following example. A woman and a man are employed as flight attendants for the same privately owned airline and have identical seniority and qualifications. The male flight attendant earns several thousand dollars more doing the same work as his female counterpart. Though existing national law may permit a private company to engage in wage discrimination, Article 119 of the EEC Treaty requires that men and women receive equal pay for equal work. The doctrine of direct effect, therefore, enables the female flight attendant to seek a remedy for wage discrimination in a national court citing the Treaty as the source of her right. These are roughly the facts from Case 43/75, *Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena*, 1976 ECR 455, 1976:2 CMLR 98.

<sup>5</sup> Case 26/62, 1963 ECR 1, 1963 CMLR 105.

<sup>6</sup> Case 43/75, 1976 ECR 455.

<sup>7</sup> Not all provisions of the Treaty satisfy the clear and unconditional requirements. For a survey of those Treaty sections that the ECJ has deemed to be directly effective, see Pierre Pescatore, *The Doctrine of "Direct Effect": An Infant Disease of Community Law*, 8 Eur L Rev 155, 160 n 11 (1983).

<sup>8</sup> Case 9/70, 1970 ECR 825, 841, 1971 CMLR 1.

<sup>9</sup> Case 152/84, 1986 ECR 723, 749, 1986:1 CMLR 688.

Unlike provisions of the Treaty, a directive cannot in principle impose obligations on individuals without some action by a Member State to incorporate the directive into national law.

in order to highlight the *Marshall* court's sharp departure from earlier direct effect cases and to argue that the line of cases based on *Grad* was correctly decided. Part III emphasizes the central weaknesses of the *Marshall* approach to the direct effect of directives. In particular, *Marshall* failed to consider that allowing an individual to enforce a right granted in a directive only against a Member State impedes the uniform application of Community law. Additionally, the ECJ failed to critically assess the largely specious argument that allowing directives to impose obligations directly on individuals would create grave problems of notice and legal uncertainty. Part IV explores parallel developments in the court's direct effect jurisprudence that appear to limit *Marshall's* reach. Together, these parts develop the thesis that the direct effect doctrine should apply to directives to the same extent that it applies to certain provisions of the Treaty.

#### I. DIRECTIVES AND THE DIRECT EFFECT DOCTRINE

In *Grad v Finanzamt Traunstein*, the ECJ held that an individual could rely on a directive, as against a Member State, even though the latter had failed to incorporate the directive into national law.<sup>10</sup> In reaching this conclusion, the ECJ overcame arguments, advanced by Member States opposed to the doctrine's extension, that the text and structure of the Treaty prevent directives from ever being directly effective. These textual and structural arguments are important to recount in some detail because the ECJ's response to these arguments represents the court's only fully elaborated justification for *not* distinguishing directives from the Treaty for purposes of applying the direct effect doctrine.<sup>11</sup>

The textual and structural arguments that might distinguish directives from the Treaty, for purposes of applying the direct effect doctrine, emerge from Articles 189 and 191 of the EEC Treaty. Article 189 states in part:

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<sup>10</sup> In *Grad*, the German government, under a 1968 German customs tax law, levied a duty on an exporter for shipping preserved fruit to Austria. The exporter brought an action against the German government alleging that the customs tax was inconsistent with article 4 of Council Dec 65/271, 1965 OJ Spec Ed 67, and article 1 of Council Dir 67/227, 1967 OJ Spec Ed 14. 1970 ECR at 828-29.

<sup>11</sup> Although the ECJ does not have a doctrine of *stare decisis* similar to the one in the United States, the court tends to follow its previous decisions. Francis Jacobs, *The Court of Justice of the European Communities* 277 (Sweet & Maxwell, 1983). Remarkably, however, *Marshall* embraced, without explanation, the same textual arguments that it rejected in *Grad*. See Part II of this Comment.

A *regulation* shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A *directive* shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A *decision* shall be binding in its entirety upon those to whom it is addressed.<sup>12</sup>

Member States opposed to applying the direct effect doctrine to directives argued that, because directives are formally addressed to Member States, they can confer rights on individuals only through subsequently enacted national legislation.<sup>13</sup>

*Grad* unequivocally rejected this argument, concluding that Article 189 does not explicitly prohibit directives from creating rights that individuals may enforce in national courts.<sup>14</sup> Relying on *Van Gend en Loos*, the Advocate-General argued that the addressee of a provision is irrelevant to direct effect analysis. To the extent that directives are clear and unconditional enough to create justiciable rights, the mere fact that they are addressed to Member States is legally irrelevant.<sup>15</sup> Conceptually, the Advocate-General's position stands as one of the most important counter-arguments to the textual objections. If a sufficiently clear and unconditional directive affects the rights or obligations of a private individual, as for example one that eliminates wage discrimination or improves the free movement of labor, then the directive should apply to individuals regardless of the formal mechanism by which it enters national law.<sup>16</sup>

<sup>12</sup> Treaty Est the Eur Eco Comm, Art 189 (emphasis added).

<sup>13</sup> See *id.*

<sup>14</sup> The ECJ concluded that the phrase "shall be binding . . . upon each Member State" should not be read to mean that only Member States are bound. Case 9/70, *Grad*, 1970 ECR at 831.

<sup>15</sup> *Id.* at 846.

<sup>16</sup> Professor Bebr concurs:

[The] direct effects of a binding Community act do not depend on its legal nature. They are based on an infringement of a Community obligation irrespective of which form of a Community act the obligation was imposed by, as may be deduced from the Court's significant remark according to which "it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned."

Bebr, *Development of Judicial Control* at 585 (cited in note 2), quoting Prelim Ruling 41/74, *Van Duyn v Home Office*, 1974 ECR 1337, 1348.

The opponents to the doctrine's extension have also argued that the direct effect doctrine would render superfluous the distinctions that Article 189 creates between regulations and directives. Under Article 189, regulations apply directly in national law without any formal implementation by a Member State; however, directives typically take effect in national law only after a Member State adopts the required implementing legislation. By allowing directives to apply directly in national law, some argue that directives would be no different than regulations.<sup>17</sup>

*Grad* rejected this argument as firmly as it had the other textual arguments.<sup>18</sup> The Advocate-General conceded that the direct effect doctrine would allow some directives to operate in national-law-like regulations but concluded that the underlying distinction between the two instruments would remain largely intact. The European Community uses directives in part to give each Member State the choice of how best to implement a directive's policy goals.<sup>19</sup> By contrast, the European Community promulgates regulations precisely to foreclose such discretion. Thus, the distinction between the two instruments turns largely on the need for Member State discretion, which the direct effect doctrine preserves.

The requirement that a directive be sufficiently clear and unconditional before it can be directly effective preserves the distinctions in Article 189.<sup>20</sup> When a directive satisfies these requirements, the Member State would have little discretion in implementation. Unlike the typical directive, which "leave[s] room to the national authorities the choice of form and method [over a its implementation],"<sup>21</sup> one that is directly effective leaves little or no room for a Member State's discretion.<sup>22</sup>

Article 191,<sup>23</sup> which requires that the Commission publish notice of a regulation in the Official Journal, indirectly provides the

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<sup>17</sup> Case 9/70, *Grad v Finanzamt Traunstein*, 1970 ECR 825, 847; see also, Hartley, *Foundations* at 206 (cited in note 2).

<sup>18</sup> Case 9/70, *Grad*, 1970 ECR at 847.

<sup>19</sup> See Hans Smit and Peter Herzog, 5 *The Law of the European Economic Community: A Commentary on the EEC Treaty* 5-609 (Matthew Bender, 1978).

<sup>20</sup> Empirically, the blurring of regulations and directives has not been a problem because the sufficiently clear and unconditional requirements have prevented most directives from having direct effect in national law. See Pescatore, 8 *Eur L Rev* at 171 (cited in note 7).

<sup>21</sup> EEC, Art 189.

<sup>22</sup> Case 9/70, *Grad*, 1970 ECR at 846.

<sup>23</sup> EEC, Art 191 states:

Regulations shall be published in the Official Journal of the Community. They shall enter into force on the date specified in them, or in the absence thereof, on the 20th day following their publication.

final textual argument against the direct effect of directives. Because regulations are always directly applicable in national law, the Commission must provide notice of their promulgation; the Treaty does not, however, require that the Commission publish notice of a directive's adoption. The opponents of the direct effect doctrine argue that without the Article 191 guarantees, directives could grant rights and, more questionably, impose obligations without an individual ever having notice of them.<sup>24</sup>

Completing his rejection of the textual and structural objections to recognizing the direct effects of directives, the Advocate-General dismissed this argument as well.<sup>25</sup> He emphasized that if publication serves a legal function it serves only a protective one. Non-publication arises as a legal issue only when an individual would incur civil liability because she acted unknowingly in contravention of an unpublished directive.<sup>26</sup> To prevent this problem, the Advocate-General suggested that no unpublished directive can impose an obligation on a private individual.<sup>27</sup>

Such a rule is well suited to current practice because the Commission publishes most, if not all, adopted directives in the Official Journal.<sup>28</sup> The Advocate-General recognized that preventing the application of the direct effect doctrine to directives, because of a few highly exceptional cases of non-publication, is not a reasonable legal solution to the problems of notice and legal uncertainty.<sup>29</sup>

While the Advocate-General addressed the textual objections, the opinion of the ECJ delineated the policy rationale underlying the direct effect doctrine.<sup>30</sup> Emerging from a federalist conception

Directives and decisions shall be notified to those to whom they are addressed and shall take effect upon notification.

<sup>24</sup> Because the plaintiff in *Grad* was enforcing a right as against a Member State, the notice discussion focused on individuals not knowing about their rights. The concern in *Grad* was that "it more or less depends on chance or the shrewdness of the individual whether he can invoke provisions of Community law favourable to him in the courts of his country." Case 9/70, *Grad*, 1970 ECR at 831.

<sup>25</sup> *Id.* at 848.

<sup>26</sup> [P]ublication is not a pre-condition of legal validity and . . . has above all a protective function, that is . . . when it is omitted the measure in question cannot be employed against an individual affected. But the situation is precisely the opposite where an individual relies on such a measure in defence of his rights, that is to say, seeks to derive benefits from it.

*Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Hartley, *Foundations* at 209 (cited in note 2).

<sup>29</sup> Case 9/70, *Grad*, 1970 ECR at 848.

<sup>30</sup> *Id.* at 837.

of the Community,<sup>31</sup> the direct effect doctrine was driven by the court's desire to maximize the effectiveness of Community law in the face of Member State intransigence.<sup>32</sup> By allowing individuals to enforce rights that the Member States had collectively agreed to extend and decreasing the rewards of inaction that an individual Member State may have wished to capture by delaying a directive's implementation, the ECJ believes that the effectiveness of Community law is enhanced.<sup>33</sup>

Often, a directive's uneven pattern of adoption among the Member States can undermine the very purpose behind the policy that it seeks to advance. Directives designed to minimize forum shopping or other "distortions in competitive trade" are weakened when all Member States do not follow their Article 189 obligations.<sup>34</sup> Given that Member States ignore their obligations to implement directives more frequently than they ignore other Community obligations, and that they often collectively agree to a directive in order to avoid collective action problems created by cross-national legal variances, the effectiveness of Community law under a directive may well depend on the doctrine of direct effect.<sup>35</sup>

## II. MARSHALL, DIRECT EFFECT, AND INDIVIDUAL OBLIGATIONS

The ECJ, in *Marshall v Southampton*, not only refused to extend the doctrine of direct effect to cover actions against private individuals, but the court also explicitly altered the legal basis for an individual's reliance on a directive as against a Member State. Much of the direct effect jurisprudence preceding *Marshall* suggested that the ECJ might have applied the direct effect doctrine

<sup>31</sup> "The objective of the EEC Treaty, which is to establish a Common Market . . . implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states." Case 26/62, *Van Gend en Loos*, 1963 ECR at 11.

<sup>32</sup> Mancini, *The Making of a Constitution* at 182 (cited in note 1).

<sup>33</sup> See Case 9/70, *Grad*, 1970 ECR at 836.

<sup>34</sup> Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study of Its Implementation in the UK, France, and West Germany*, 2 L Issues of Eur Integration 101, 123 (1990).

<sup>35</sup> While the doctrine of direct effect allows private enforcement of Community law, Articles 169 and 170 of the Treaty enable the Commission to pursue legal action, after administrative review, against a Member State that it believes has failed to fulfill its Community obligations. Scholars are divided over the effectiveness of these enforcement actions. See, for example, Mancini, *The Making of a Constitution* at 182 (cited in note 1) ("Community authorities often turn a blind eye [to infractions] . . . and even when the Commission institutes proceedings against the defaulting state . . . the Court cannot impose any penalty on the offender"). But see Hartley, *Foundations* at 314-15 (cited in note 2) ("one can say that the enforcement procedure is effective in the great majority of cases").



to directives to the same extent that it covers provisions of the Treaty. *Grad* emphasized the similarities between the two instruments for purposes of the direct effect analysis and *Defrenne* established that at least some instruments of Community law could directly impose obligations on private individuals regardless of a Member State's recalcitrance. The ECJ in *Marshall*, however, declined to extend this doctrine to include directives.

In *Marshall*, the plaintiff worked for the Southampton and South-West Hampshire Area Health Authority ("Health Authority") from 1966 to 1980. Since the mid-1970s, the Health Authority had a written policy, which became an implied term of Marshall's employment contract, that women should retire at age 60 and male employees at age 65. Marshall continued working at the Health Authority past her sixtieth birthday, but, two years later, the Health Authority dismissed her for the sole reason that she had passed the retiring age for women. But for the fact that she was a woman, Marshall would have been allowed to work three more years.<sup>36</sup>

As a result of her dismissal, Marshall sued the Health Authority claiming sex discrimination in violation of a Community directive that the British government had not yet incorporated into national law.<sup>37</sup> The British Employment Appeal Tribunal dismissed the claims arising under the directive on the ground that an individual could not rely on the violation of a directive in a British court or tribunal.<sup>38</sup> Marshall appealed, and the British Court of Appeals requested that the ECJ issue a preliminary ruling on the issues of Community law.

The ECJ held that Marshall's dismissal was a violation of the directive and that she was entitled to rely upon it *as against the state authority*.<sup>39</sup> Had the ECJ or British Court of Appeals found that the Health Authority was not part of the British state, Marshall would have been unable to recover under the directive.<sup>40</sup> Although this holding is consistent with the other cases involving di-

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<sup>36</sup> Case 152/84, *Marshall v Southampton*, 1986 ECR 723, 726.

<sup>37</sup> Council Directive 76/207, 1976 OJ L39:40. In 1986, the British government amended the Sex Discrimination Act of 1975 to allow others in Marshall's position to recover directly under national law. See *Marshall v Southampton* ("*Marshall II*") 1990:3 CMLR 425, 441 (English Court of Appeals).

<sup>38</sup> Case 152/84, *Marshall*, 1986 ECR at 726.

<sup>39</sup> *Id* at 751.

<sup>40</sup> The ECJ emphasized that the boundaries of a particular state are something for each national court to decide, to which the Advocate-General added that the national courts should construe "state" broadly. *Id* at 735.

rectives and the direct effect doctrine, *Marshall* concluded, in dicta, that a directive can never impose obligations on individuals in the absence of national implementing legislation.<sup>41</sup>

To reach this result, the ECJ had to shift the legal basis for a directive's effect in national law. The original rationale behind the direct effect doctrine, that Community law should be interpreted and applied in such a way as to enhance its effectiveness, suggested no legal distinction between actions against a Member State and one against a private individual.<sup>42</sup> The Advocate-General acknowledged that the effectiveness rationale is one of "general application"<sup>43</sup> but nonetheless employed a narrowing principle, the equity principle of estoppel.<sup>44</sup>

As the ECJ currently applies it, estoppel establishes a bright line between actions against a state entity and a private individual.<sup>45</sup> Drawing on language in *Becker v Finanzamt Munster-Innenstadt*,<sup>46</sup> the Advocate-General argued that a Member State that fails to adopt national legislation pursuant to a directive by a specified date is in breach of its Article 189 obligations to implement directives and of its Article 5 obligations to follow Community law. As a result of such a breach, a Member State "which has not adopted the implementing measures required by the directive . . . may not plead, as against individuals, its own failure to perform the obligations which the directive entails."<sup>47</sup> Under this rationale, non-state actors cannot be held liable under a directive because Article 189 imposes obligations only on Member States.<sup>48</sup>

<sup>41</sup> Id at 749.

<sup>42</sup> Even some who agreed with the ECJ's position in *Marshall* pointed this out. See Hartley, *Foundations* at 209 (cited in note 2).

<sup>43</sup> Case 152/84, *Marshall*, 1986 ECR at 733-34.

<sup>44</sup> Earlier ECJ cases mentioned the estoppel principle, but not until *Marshall* did the ECJ raise the estoppel principle as a limiting condition on the direct effect of directives.

<sup>45</sup> Though the ECJ creates this bright line rule for actions under a directive, the national courts must still develop criteria for determining when a party is an emanation of the state. For a good analysis of the British approach to this issue, see Deirdre Curtin, *The Province of Government: Delimiting the Direct Effect of Directives in the Common Law Context*, 15 Eur L Rev 195 (1990).

<sup>46</sup> Case 8/81, 1982 ECR 53, 1982:1 CMLR 499.

<sup>47</sup> Case 152/84, *Marshall*, 1986 ECR at 733-34, citing Case 8/81, *Becker*, 1982 ECR at 71.

<sup>48</sup> See Case 148/78, *Pubblico Ministero v Ratti*, 1979 ECR 1629, 1980:1 CMLR 96. A Member State "may not rely, as against individuals, on its own failure to perform the obligations which the directive entails." Id, 1979 ECR at 1642 cited in Derrick Wyatt and Alan Dashwood, *The Substantive Law of the EEC* 45 (Sweet & Maxwell, 1987). See also, Hartley, *Foundations* at 208 nn 74, 75 (cited in note 2).

To further its argument justifying a state/non-state distinction, the ECJ embraced the same textual and structural arguments that it had rejected in *Grad*. Directives cannot be directly effective as against a private individual, the *Marshall* court concluded, because (1) directives are addressed to the Member States, not to individuals; (2) the Treaty does not mandate that the Commission publish directives, thereby exposing unsuspecting individuals to civil liability; and (3) that such an application of the doctrine would "totally blur" the distinction between regulations and directives.<sup>49</sup>

In accepting these arguments without discussion, the *Marshall* court departed sharply from what had previously been its unequivocal rejection of these textual barriers. The ECJ had not only dismissed these arguments in *Grad* but, also, in a line of cases that followed. In *SACE v Ministry for Finance of the Italian Republic*,<sup>50</sup> the Member States raised the same textual and structural objections, but the Advocate-General summarily dismissed them stating that *Grad* had "rendered pointless [these] objections."<sup>51</sup> In *Van Duyn v Home Office*,<sup>52</sup> the ECJ reiterated its arguments from *Grad* nearly verbatim.<sup>53</sup>

### III. MARSHALL: FURTHER PROBLEMS

#### A. The Application of Estoppel to Directives: The State/Non-State Distinction

*Marshall* settles at least temporarily the legal status of directives with respect to the doctrine of direct effect.<sup>54</sup> When a recalcitrant Member State fails to adopt a directive, an individual may enforce a right outlined in a sufficiently clear and unconditional

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<sup>49</sup> Case 152/84, *Marshall*, 1986 ECR at 734, 749.

<sup>50</sup> Case 33/70, 1970 ECR 1213, 1971 CMLR 123. In *SACE*, the Italian government levied a charge for administrative services on goods that the plaintiffs had imported from another Member State. The plaintiffs objected on the grounds that it was a charge having the effect of a customs duty which is in violation of Commission Directive 68/31, 1968 JO L12:8. See also Case 51/76, *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, 1977 ECR 113, 1977:1 CMLR 413.

<sup>51</sup> Case 33/70, *SACE*, 1970 ECR at 1228.

<sup>52</sup> Prelim Ruling 41/74, 1974 ECR 1337.

<sup>53</sup> *Id* at 1348.

<sup>54</sup> See Case 221/88, *CECA/Busseni*, 1990 Rec I-495; Case C-262/88, *Barber v Guardian Royal Exchange Assurance*, 1990:2 CMLR 513; Case 14/86, *Di Salo v Persons Unknown*, 1987 ECR 2545; Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, 1986 ECR 1651, 1986:3 CMLR 240.

directive against a Member State only through the operation of estoppel.

To a judge or lawyer, basing the direct effect of directives on the equity notion of estoppel may have more appeal than the purely policy arguments of effectiveness.<sup>55</sup> Estoppel is more conservative in its reach and easier to square with the textual objections. However, these factors should not compel the conclusion that estoppel is the proper justification for the direct effect of directives. To prevent directives from creating rights that an individual can enforce against another private individual impinges upon the effectiveness of Community law. One of the central weaknesses of *Marshall* is that it did not appreciate the extent to which the estoppel and effectiveness rationales may conflict.

The central problem with *Marshall's* state/non-state distinction is that it creates inequities in the application of Community law. This distinction means that an individual's ability to recover for the infringement of a right outlined in a directive may turn on the vagaries of where she lives and for whom she works. By the ECJ's previously articulated standards, such an uneven application of Community law should not be acceptable. In considering the scope of a Treaty provision's direct effect, the Court in *Defrenne* dismissed a state/non-state distinction precisely because it created "unacceptable discrimination."<sup>56</sup>

In *Defrenne*, the plaintiff brought an action against Sabena for engaging in sex-based wage discrimination which Article 119 of the EEC Treaty prohibits. Defrenne claimed that during three years of her employment, from 1963 to 1966, she was paid less than a male steward of the same seniority would have been. The ECJ concluded that the plaintiff was entitled to rely on Article 119 to enforce her claims for wage-discrimination regardless of the offending party's relationship with the Belgian state. Whether the defendant, Sabena, was an emanation of the state, as a nationalized company, or a private employer made no difference in determining Article 119's direct effect.<sup>57</sup> Recognizing the problems of discrimination that such a distinction would engender, the Advocate-General warned: "if we were to accept that [Article 119] is directly applicable only against public employers this would . . . constitute fresh and unacceptable discrimination between the public and pri-

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<sup>55</sup> See, for example, Hartley, *Foundations* at 209 (cited in note 2).

<sup>56</sup> Case 43/75, *Defrenne v Sabena*, 1976 ECR 455, 488.

<sup>57</sup> "The legal status of Sabena and its relationship with the Belgian State have . . . no relevance to the present dispute." *Id.*

vate sectors.”<sup>58</sup> The ECJ concurred and thus rejected the state/non-state distinction in determining the direct effect of Treaty provisions.<sup>59</sup>

This distinction is no less of a problem in the context of directives where the estoppel regime creates inequities in the application of Community law both within Member States and between them. Within a Member State, the effect of *Marshall* is to create a set of rights conditional upon who happens to be the opposing party. When the opposing party is the state or an emanation of the state, a right may exist, but if the opposing party is a private entity, it may not. Imagine, for example, the situation of two female nurses who have encountered sex-based wage discrimination. Under *Marshall*, the one who happens to work for a state-run health authority could institute an action against her public employer, but the one who happens to work for a private hospital would have no remedy under Community law.<sup>60</sup>

Under the U.S. constitutional doctrine of state action, such distinctions should not be surprising. Although state actors are held to the standards of the Fourteenth Amendment, private individuals, unless barred by statute, may discriminate on the basis of sex or race.<sup>61</sup> In the European Community, however, Member States adopted many social directives precisely to order private relationships as well as those existing between private individuals and the state. The directives under which individuals seek to enforce protection for sex-based discrimination in hiring, retirement, and wages are intended to apply to a broad category of economic relationships that cover state as well as non-state employers.<sup>62</sup> *Marshall* has the effect, then, of creating public/private distinctions where the Member States intended none to exist.

The *Marshall* regime raises inequities in the application of Community law across Member States as well as within one. The *Marshall* court refused to define the term “state” for the purposes of applying estoppel, allowing each national court to determine

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<sup>58</sup> Id.

<sup>59</sup> Id. at 475.

<sup>60</sup> Hartley, *Foundations* at 210 (cited in note 2).

<sup>61</sup> See, for example, *Shelley v Kraemer*, 334 US 1, 13 (1948) (the Fourteenth Amendment guarantees protection only from the actions that “may fairly be said to be that of the States”). However, state action can also be imputed to private actors in some circumstances. See, for example, *Burton v Wilmington Parking Authority*, 365 US 715 (1961) (state action found in private restaurant’s refusal to serve black customer); *Evans v Newton*, 382 US 296 (1966) (providing a park held to be state action).

<sup>62</sup> See Comment, *Equal Pay in the European Community: Practical and Philosophical Goals*, 1992 U Chi Legal F 477.

which administrative agencies, local governments, nationalized companies or private licensing groups are appropriately within the definition of the term "state."<sup>63</sup> As a result, in one state a particular governmental unit or nationalized industry may be part of the state, though its counterpart in another Member State may not be.<sup>64</sup> To illustrate the cross-national inequities in Community law that this state by state process of definition creates, one commentator gives the example of a directive that would affect the licensing of health professionals.<sup>65</sup> In a Member State in which the Ministry of Health is responsible for licensing, an individual denied the right to practice medicine could seek a remedy under the directive, regardless of whether the Member State had implemented the directive. However, in a Member State in which a private medical association is responsible for licensing, a similarly situated individual would have no remedy unless the state had implemented the directive.<sup>66</sup>

#### B. Directives, Individual Obligations, and Legal Uncertainty

Compounding the weakness of the estoppel approach is the ECJ's failure to critically assess the argument that the full application of the direct effect doctrine to directives would create grave problems of notice and legal uncertainty.<sup>67</sup> Member States opposing expansive application of the direct effect doctrine place legal certainty at the foundation of their critique.<sup>68</sup> If individuals cannot easily tell when they have an obligation arising under Community law, then they will not be able to adjust their conduct to avoid civil liability.<sup>69</sup> A further problem may be that even if individuals are

<sup>63</sup> Case 152/84, *Marshall v Southampton*, 1986 ECR 723, 749. For a discussion of how British and Irish courts have defined the term "state," see J. Steiner, *Coming to Terms with EEC Directives*, 106 Law Q Rev 144, 147 (1990); Curtin, 15 Eur L Rev at 195 (cited in note 45); P. E. Morris, *The Direct Effect of Directives—Some Recent Developments in the European Court II*, 1989 J Bus L 309, 316-19.

<sup>64</sup> The issue has arisen only in Britain and Ireland. See Curtin, 15 Eur L Rev at 199 (cited in note 45).

<sup>65</sup> A. J. Easson, *Can Directives Impose Obligations on Individuals?*, 4 Eur L Rev 67, 77 (1979).

<sup>66</sup> This hypothetical assumes that the courts, in applying *Marshall*, would not define the private medical association to be part of the state.

<sup>67</sup> For a discussion of how legal uncertainty could be created under such a regime, see Easson, 4 Eur L Rev at 75-76 (cited in note 65).

<sup>68</sup> See Case 9/70, *Grad*, 1970 ECR at 831; Case 33/70, *SACE*, 1970 ECR at 1217; Prelim Ruling 41/74, *Van Duyn*, 1974 ECR at 1343. See also, Derrick Wyatt, *The Direct Effect of Community Social Law—Not Forgetting Directives*, 8 Eur L Rev 241, 246 (1983).

<sup>69</sup> A directive that has not yet been incorporated in national legislation cannot aggravate criminal liability. See discussion at note 75.

aware of a directive, it may be ambiguous with respect to their rights or obligations. Such arguments cannot withstand close scrutiny.

1. *Problems of notice and legal certainty.*

A legal regime in which individuals are bound by directives creates only marginal uncertainty. Individuals already have a responsibility to know their obligations under Community law because regulations and decisions, as well as the Treaty, may impose duties on them. This responsibility is particularly pronounced with regulations since the Commission issues regulations more frequently than directives.<sup>70</sup>

Even if the European Community issued directives with greater frequency, most would not be directly effective.<sup>71</sup> An individual cannot enforce a right contained in a directive until a Member State is in default of its Article 189 obligations, which occurs only after it has failed to adopt the required implementing legislation by the date specified in the directive. Since Member States adopt a majority of the directives promulgated,<sup>72</sup> the issue of direct effect does not frequently arise. Even when it does, the ECJ only gives direct effect to those directives that satisfy the conditions of clarity and unconditionality. Most directives do not satisfy these conditions.<sup>73</sup>

Because directives are not typically directly effective and nearly all are published in the Official Journal as a matter of practice, the problems of notice and legal certainty are arguably less than those arising from other instruments of Community law. Against such a backdrop, Professors Derrick Wyatt and Alan Dashwood argue that *Marshall* fails by preventing individuals from enforcing rights against other private individuals, "even in cases where [such enforcement] . . . could not prejudice [an individual's] legal security." They suggest that the ECJ should have adopted a case by case approach that allows an individual to plead legal uncertainty as a complete defense.<sup>74</sup>

Historically, the ECJ has responded flexibly to issues of legal uncertainty when they have arisen. Consider, for example, the Ad-

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<sup>70</sup> Easson, 4 Eur L Rev at 76 (cited in note 65).

<sup>71</sup> Pescatore, 8 Eur L Rev at 171 (cited in note 7).

<sup>72</sup> See, for example, Report of the Commission to the Council and European Parliament on the Implementation of Measures Completing the Internal Market, 1991 COM 2491 at 1, Annexes 1, 2, 4.

<sup>73</sup> Pescatore, 8 Eur L Rev at 171 (cited in note 7).

<sup>74</sup> Wyatt & Dashwood, *The Substantive Law of the EEC* at 47 (cited in note 48).

vocate-General's rule in *Grad* that an unpublished directive cannot grant a right or impose an obligation on anyone. In the context of criminal law, where problems of legal certainty and notice may create unacceptably large risks, the ECJ stated unequivocally that an individual cannot suffer a criminal sanction through the operation of a directive that a Member State has not incorporated into national law.<sup>75</sup> Where a Member State has implemented a directive, the ECJ held recently that national courts cannot use a directive as an interpretative source to construe an unclear or ambiguous statute, passed pursuant to a directive, when the effect would be to enhance a defendant's criminal liability.<sup>76</sup>

2. *Ambiguous directives and direct effect.*

Although a directive may be clear and unconditional enough to satisfy the prerequisites for direct effect, it may be ambiguous with respect to the precise legal duties that it creates. The ECJ confronted this issue in *Barber v Guardian Royal Exchange*.<sup>77</sup> In *Barber*, the plaintiff sued his employer, arguing that sex-based rate differences in the company's pension plan violated Article 119 of the Treaty which prohibits sex-based wage discrimination. The employer appeared to be aware of its obligations under Article 119 but argued that wages do not include benefits such as a pension plan. The ECJ rejected the employer's position and held that discrimination in future benefits constitutes sex-based wage discrimination. Since the defendant could not have reasonably known that Article 119 reached its pension plans, the ECJ applied its holding prospectively.<sup>78</sup> In *Defrenne*, the ECJ similarly chose to apply its holding prospectively.<sup>79</sup> Thus, the ECJ has demonstrated that it can create parsimonious and flexible solutions to lessen the otherwise harsh impact of the direct effect doctrine without having to reject the doctrine altogether.

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<sup>75</sup> Case 372-374/85, *The State v Oscar Traen*, 1987 ECR 2141, 1988:3 CMLR 511; *Di Salo*, 1987 ECR 2545; Case 80/86, *Officier Van Justitie v Kolpinghuis Nijmegen BV*, 1989:2 CMLR 18. In principle, the ECJ's position is redundant because a state could not prosecute someone under a directive when it has itself failed to implement the legislation required by the directive.

<sup>76</sup> Joined Cases 206/88, 207/88, *Vessoso v Zanetti* (transcript) (LEXIS, Europe Library, Cases File).

<sup>77</sup> Case C-262/88, 1990:2 CMLR 513.

<sup>78</sup> *Id* at 558.

<sup>79</sup> Case 43/75, *Defrenne*, 1976 ECR at 482.



IV. PARALLEL DEVELOPMENTS: FROM *VON COLSON* TO *MARLEASING*

A parallel development in the ECJ's direct effect jurisprudence suggests that even the ECJ may not be fully convinced that *Marshall* is rightly decided. Beginning in 1984 with *Von Colson and Kamann v Land Nordrhein-Westfalen*<sup>80</sup> and culminating in 1990 with *Marleasing SA v La Comercial Internacional de Alimentación SA*,<sup>81</sup> the ECJ developed a doctrine that permits a directive to impose obligations on individuals even though a Member State has not adequately implemented it. In *Von Colson*, the ECJ held that courts, to the extent permitted by national law, have a duty to interpret statutes adopted pursuant to a directive in light of the directive's aim and purpose. This duty may result in the creation of individual rights and obligations that may not have existed but for the use of Community law as an interpretative aid.

In *Von Colson*, the West German government implemented a directive designed to eliminate sex-based discrimination in hiring but provided only nominal sanctions for those who violated the statute. Aggrieved parties could recover only for damages to their reliance interest, which amounted to little more than the cost of the postage stamp that they used to mail their application.<sup>82</sup> Even though by law employers were prohibited from sex-based hiring discrimination, they *in fact* faced nominal penalties for doing so. Recognizing that this remedy did not provide sufficient incentives for employers to change their discriminatory hiring practices, the ECJ instructed German courts to read a stronger remedy into the statute.<sup>83</sup>

The ECJ reasoned that, because a national court is part of the state, it too has a duty under Article 5 of the Treaty to implement a directive's principles. This duty requires that courts "interpret [their] national law in the light of the wording and purpose of the directive."<sup>84</sup> Thus, where a statute fails to incorporate the means sufficient to achieve a directive's goals, the national courts should make the necessary adjustments.

The ECJ has explicitly acknowledged that the application of the *Von Colson* interpretative strategy may result in the imposi-

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<sup>80</sup> Case 14/83, 1984 ECR 1891, 1986:2 CMLR 430. See also Case 79/83, *Harz v Deutsche Tradax GmbH*, 1984 ECR 1921, 1986:2 CMLR 430.

<sup>81</sup> Case C-106/89, 1992:1 CMLR 305.

<sup>82</sup> The West German court had originally awarded the plaintiff DM 7.20 (roughly \$2.50). Case 14/83, *Von Colson*, 1986:2 CMLR at 448.

<sup>83</sup> *Id* at 447.

<sup>84</sup> *Id* at 453.

tion of private obligations where none may have existed under national law. The Advocate-General stated candidly in *Vessoso v Zanetti* that:

[The] rule of interpretation [from *Von Colson*] may thus have the result that obligations may arise and be enforceable in civil proceedings between private parties which would not result from an interpretation of the national legislation taken in isolation.<sup>85</sup>

Through *Von Colson*, the ECJ achieves the same objectives—the effectiveness of directives and the imposition of individual obligations—that the direct effect doctrine could supposedly not achieve because of the Treaty's text.

Left unanswered in *Von Colson* was the full extent of the interpretative strategy's reach. Did it, for example, cover only statutes enacted pursuant to a directive or did it also extend to statutes adopted prior to a directive's promulgation? In *Marleasing*, the ECJ gave the *Von Colson* interpretative strategy its full reach by holding that national courts should interpret laws enacted before a directive's promulgation in light of the latter's aim and purpose.<sup>86</sup> Thus, even where a recalcitrant Member State makes no attempt to implement a directive, a national court can interpret a previously enacted statute to conform with a directive.

Taken together, *Von Colson* and *Marleasing* challenge *Marshall*'s fundamental conclusion that directives do not impose obligations on individuals without specific implementing legislation. While *Von Colson* may strain the reasoning in *Marshall*, *Marleasing* actually tends to contradict the *Marshall* holding. The textual arguments that the ECJ embraced in *Marshall* suggest that directives impose obligations on individuals only *after* a Member State has enacted the required implementing legislation. Similarly, the estoppel rationale suggests that individual obligations arise only through the operation of a statute enacted pursuant to a directive. The central principle of *Marshall*—that directives impose obligations on individuals only through the operation of national law—remains intact but only because the courts, in addition to the national legislatures, are now agents through which a directive can enter national law.

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<sup>85</sup> Joined Cases 206/88, *Vessoso*. *Vessoso* effectively limits *Von Colson* to civil cases.

<sup>86</sup> Case C-106/89, *Marleasing*, 1992:1 CMLR at 322-323; see also J. Stuyck and P. Wytinck, Case Note, *Marleasing SA v La Comercial Internacional de Alimentación SA*, 28 Common Mkt L Rev 205 (1991).

Although, in theory, the *Von Colson* interpretative strategy may lessen *Marshall's* impact, national courts have not been willing to follow it. National courts may be no less hostile to the *Von Colson* interpretative strategy than they were to the ECJ's attempts to extend the direct effect doctrine.<sup>87</sup> One need go no further than the British courts' hostile reaction to *Von Colson* to see that this alternative route to maximizing the effectiveness of directives may not fully succeed.

In *Duke v Reliance Systems Ltd.*,<sup>88</sup> the House of Lords rejected the argument that *Von Colson* applies to statutes enacted prior to the European Community's promulgation of a directive. According to *Duke*, British courts should only use a directive as an interpretative source when a statute is passed pursuant to a directive. Moreover, *Duke* suggested that in construing a statute, national courts should examine "the circumstances prevailing at the date of enactment."<sup>89</sup> While avoiding the question of what weight a directive should carry, *Duke* implied that a directive is not *the* authoritative source but merely one of many that a judge should consult in construing a statute. *Duke* bluntly concluded that the act through which Great Britain entered the Community<sup>90</sup> "does not . . . enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals."<sup>91</sup> Even though later cases indicate that the British courts may be willing to use a directive as an interpretative aid in construing legislation passed pursuant to a directive,<sup>92</sup> the courts continue to bristle at the notion that they must construe preexisting legislation to conform to a subsequent directive.<sup>93</sup> Similar resistance by other national courts has led some commentators to conclude that "there is no clear line in national court decisions as to the extent to which they will follow *Von Colson*."<sup>94</sup>

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<sup>87</sup> For a discussion of national courts' reactions to the direct effect doctrine, see, generally, Hartley, *Foundations* at 225-27, 230-32 (cited in note 2).

<sup>88</sup> 1988:1 CMLR 719 (House of Lords).

<sup>89</sup> *Marshall v Southampton ("Marshall II")*, 1990:3 CMLR 425, 439 (citing Lord Templemen in *Duke*, 1988:1 CMLR at 731). At issue in *Marshall II* was the remedy to which the plaintiff was entitled.

<sup>90</sup> European Communities Act, sec 2(4) (1972).

<sup>91</sup> *Marshall II*, 1990:3 CMLR at 439 (quoting Lord Templemen in *Duke*, 1988:1 CMLR at 732).

<sup>92</sup> See *Litster v Forth Dry Dock & Engineering Co Ltd*, 1989 IRLR 161; *Pickstone and others v Freemans plc*, 1989 AC 66.

<sup>93</sup> Stuyck & Wytinck, 28 Common Mkt L Rev at 218 n 24 (cited in note 86).

<sup>94</sup> *Id.*

## CONCLUSION

The reluctance of national courts to use directives as an interpretative aid to create greater rights than a statute originally granted reinforces a political explanation for *Marshall*. Historically, the doctrine of direct effect has generated hostile reactions from national courts. Indeed, in a widely reported incident, the French Conseil d'Etat held that an individual could not rely on a directive in an administrative hearing thereby unilaterally limiting the direct effect doctrine in France without consulting the ECJ.<sup>96</sup> Even commentators who support the reasoning behind *Marshall* recognize that the decision was largely shaped by political realities. The hostile reactions of the Conseil d'Etat, as well as the German Bundesfinanzhof, to the direct effect doctrine, "[were] obviously a serious matter and, while the European Court refused to retreat from the position it had adopted [in *Grad*, the *Marshall* court] probably considered it expedient not to press any further."<sup>96</sup>

Ultimately, even if one is persuaded that *Marshall* was wrongly decided, the political challenge for the ECJ remains. Both the hostile reaction of the national courts to the doctrine of direct effect and the reluctance of the national courts to utilize the *Von Colson* interpretative approach reveal the ECJ's weak institutional position. The ECJ relies, to a large extent, on the good will of the national courts for its political effectiveness:<sup>97</sup> its ability to extend the effectiveness of Community law depends largely on the willingness of national courts to refer cases to it under Article 177, and to enforce ECJ interpretations through the coercive power of national law.<sup>98</sup> National courts, until they are willing to accept in principle that a directive can impose obligations on individuals, will effectively check the ECJ's doctrinal moves.

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<sup>96</sup> See Hartley, *Foundations* at 228-36 (cited in note 2). For further discussion on how the national courts have reacted to the direct effect doctrine see, Pescatore, 8 *Eur L Rev* at 169-170 (cited in note 7); Mancini, *The Making of a Constitution* at 182 (cited in note 1); Steiner, 106 *L Q Rev* at 145 (cited in note 63).

<sup>97</sup> Hartley, *Foundations* at 209 (cited in note 2).

<sup>98</sup> Mancini, *Making of a Constitution* at 178 (cited in note 1).

<sup>99</sup> *Id.*

